APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6267

CONWOOD COMPANY, L.P.;
CONWOOD SALES COMPANY, L.P.,
Plaintiffs-Appellees,
v.
UNITED STATES TOBACCO COMPANY; UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.; UNITED STATES TOBACCO MANUFACTURING COMPANY, INC.; UST, INC.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 98-00108—Thomas B. Russell, District Judge.

Argued: November 27, 2001
Decided and Filed: May 15, 2002

Before: CLAY and GILMAN, *Circuit Judges*; EDGAR, *Chief District Judge*.*

OPINION

CLAY, Circuit Judge. Defendants-Appellants, United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco

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* The Honorable R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

Manufacturing Company, Inc., and UST, Inc. (herein collectively referred to as "USTC") appeal from the March 29, 2000 order, after trial by jury, entering judgment in favor of Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") for Defendants' violations of the Sherman Anti-Trust Act, 15 U.S.C. § 2. Conwood alleged that USTC violated the Act by using its monopoly position to exclude competitors from the moist snuff market. We AFFIRM.

BACKGROUND

Procedural History

On April 22, 1998, Conwood filed an eight-count complaint against USTC alleging the following causes of action: (1) Unlawful Monopolization, in violation of § 2 of the Sherman Act; (2) Violations of § 43(a) of the Lanham Act; (3) Tortious Interference with contract; (4) Tortious Interference with prospective advantage; (5) Violations of the Kentucky Revised Statute, § 365.050; (6) Product Defamation; (7) Unjust Enrichment; and (8) Conversion/Trover. USTC filed counterclaims for conversion and violations of the Lanham Act and Sherman Act.

In November 1999, USTC moved for summary judgment as to Conwood's federal claims and dismissal without prejudice as to the pendent state law claims. USTC also filed a motion in limine to exclude the testimony of Conwood's expert witness, Dr. Richard Leftwich, and moved separately to exclude Leftwich's damages study and future testimony during trial. The district court denied USTC's summary judgment motion on February 17, 2000. On February 23, 2000, the district court also denied USTC's motions with respect to Leftwich.

In February 2000, the case proceeded to trial. Before the case went to the jury, Conwood agreed to dismiss the state law claims and both parties agreed to dismiss their respective

Lanham Act claims asserted against one another. The jury deliberated for four hours, returning a $350 million verdict in favor of Conwood. The district court entered judgment on March 29, 2000, and therein trebled the amount of the award to $1.05 billion, pursuant to 15 U.S.C. § 15(a). The jury also ruled in favor of Conwood on USTC's conversion and Sherman Act claims.

Conwood moved for a permanent injunction, pursuant to 15 U.S.C. § 26, to prevent USTC from, among other things, removing or eliminating any competitors' advertising material in retail stores, without the prior consent of the retailer. The district court granted the motion on August 10, 2000. USTC moved for judgment as a matter of law, or for a new trial or reduction in damages, arguing that its conduct was not exclusionary, competition was not harmed and that Conwood had not established causation and damages. The district court denied the motion on August 10, 2000. On September 11, 2000, USTC filed this timely notice of appeal challenging the district court's (1) February 17, 2000 denial of its motion for summary judgment; (2) February 23, 2000 order denying its motion to exclude the damages study and testimony of Leftwich; (3) March 29, 2000 judgment on the jury verdict; (4) August 10, 2000 order denying its motion for judgment as a matter of law, or in the alternative for a new trial or reduction of damages; and (5) August 10, 2000 order granting Conwood's motion for permanent injunctive relief.

Facts

Both Conwood and USTC are manufacturers of moist snuff, a finely chopped smokeless tobacco that the user consumes by placing a small amount between the gum and cheek. The product is sold in small round cans, at a price of between $1.50 and $3. USTC produces the industry staples "Skoal" and "Copenhagen." Conwood's brands include "Kodiak" and "Cougar."

USTC's predecessor, Duke Trust, started the moist snuff industry in 1822, with its Copenhagen brand. In 1911, a judicial decree broke up the Duke Trust monopoly, which spawned three companies: American Snuff Company (Conwood's predecessor); USTC; and "Helme" (which is now known as Swisher International Group, hereinafter, "Swisher"). American Snuff Company changed its name to Conwood sometime during the 1950s. Conwood and Swisher were involved for many years in the "dry snuff" market. For sixty years, USTC was the sole manufacturer of moist snuff. Swisher and Conwood entered the moist snuff market in the late 1970s. The only other competitor in the moist snuff market is Swedish Match ("Swedish"). Thus, there are only four competitors in the moist snuff market in the United States.

After Conwood, Swisher, and Swedish entered the market, USTC's market share, which at one point was virtually 100 percent, declined. By 1990, the four manufacturers sold 28 different brands of moist snuff and USTC's market share was approximately 87 percent. During the 1990s, market growth accelerated in the moist snuff industry, and USTC's market share continued to drop. At trial, one of Conwood's expert witnesses, Morton Kamien, a professor at Northwestern University's Kellogg Graduate School of Business, testified that USTC currently controls 77 percent of the moist snuff market; Conwood controls approximately 13 ½ percent of the market and Swedish and Swisher comprise approximately 6 percent and 4 percent of the market, respectively.

In 1999, total moist snuff sales amounted to $1.68 billion. Also, in 1999, USTC earned approximately $813 million in revenues before taxes, interest and amortization. The company has the highest profit margin of any public company in the country. Kamien testified that because USTC is one of the most profitable companies in the country, and because of the amount of profit at stake in the moist snuff market, it "would

be a ripe opportunity for other firms to come in and try to get into the market . . . ." However, there have been no new entrants in the market since 1990. In addition, although USTC declined in market share about 1 percent per year between 1979 and 1999, Kamien testified that had there been true competition in the moist snuff industry, the decline would have gone much faster. He found it remarkable that while USTC's market share decreased, the company raised its prices. Testimony revealed that USTC had raised its prices approximately 8 to 10 percent per year between 1979 and 1998.

The Importance of In-store Advertising

Moist snuff is generally sold from racks. The racks have gravity fed slots or facings, from which consumers may select a can of the product. Each facing is filled with cans of a single brand of moist snuff. In addition to dispensing cans, the racks also provide "point of sale" ("POS") advertising, generally carried out by a "header card"—a cardboard sign attached to the front of the rack. The header card may contain such information as the name of the brand of moist snuff, any promotions running with the product, and a picture of the product.

The parties agree that POS in-store advertising is critical in the moist snuff industry because unlike with other products, such as soft drinks or snacks, tobacco advertising is restricted. Tobacco products cannot be advertised on TV or radio, and some places have restrictions on other forms of advertising outside of a retail store, such as on billboards. Further, the number of people who use smokeless tobacco products is relatively small in relation to those who consume other tobacco products. Thus, according to Harold Price, Swedish's vice president of sales and marketing, the point at which the buyer makes his purchase decision is the optimal time to convince the buyer to purchase a particular brand of moist snuff. Price testified that the "single most important" tool for

advertising is the merchandise rack, "because that's where we have the greatest opportunity and the last point to reach the consumer before [the consumer] makes [his or her] purchase decision."

Exclusive Racks, Category Management and CAP

Conwood showed at trial that beginning in 1990, USTC pursued strategies, emanating from high-level management, to exclude competition in the moist snuff market.

According to trial testimony, USTC had been able to convince "a number of major retailers" to allow it to have "exclusive racks" in their stores. An "exclusive rack" refers to one manufacturer supplying a rack to display its moist snuff products and those of all other manufacturers. Kroger's Steven Luckett testified that while his store permits each moist snuff company to have its own rack, an advantage of allowing only one rack to store all similar products is uniformity. It also allows retailers to stack products in a manner that looks more attractive and neat. According to Alan Hart, a former USTC salesman, less than 10 percent of stores carried USTC racks exclusively, and of those that did "most all of them" did so because the store authorized it. Several retailers testified that they requested exclusive racks. In fact, Mary Stevens, who managed a Kiwi store in Billings, Montana, testified that she used only a Conwood rack.[1]

During the 1990s, many retailers adopted the practice of category management. This practice varies from store to store, and involves managing product groups and business units and customizing them on a store-by-store basis to

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[1] USTC also points out that in 1996, Wal-Mart asked it and other moist snuff manufacturers to design a rack for the store to use for its moist snuff products. (J.A. at 492.) Conwood decided not to participate in the contest. *Id.* USTC's design won. *Id.* Swisher also won similar competitions for exclusive rack systems in K-Mart and Tom Thumb stores. (J.A. at 2859, 518-19, 1447-48.)

satisfy customer demands. The process can determine the quantity of items a store sells. For instance, it allows retailers, based on such data as sales volume, to determine which items should be allocated more shelf space. Manufacturers support the efforts of retailers by presenting to them products or a combination of products that are more profitable and "plan-o-grams" describing how, and which, products should be displayed. At Wal-Mart, Swedish and USTC were involved with category management, which entailed suggesting which items should be on the racks. Swisher at one point was also involved in the process.

As part of the category management process, retailers review plan-o-gram information provided by the manufacturer and compare the products they suggest be sold to the retailer's own independent analysis. The process is designed to ensure the best selling products are included in the plan-o-gram. Larry Luckett, who decides which moist snuff products will be sold at Kroger Company, testified that any supplier trying to use category management practices to control competition, in his store anyway, would be "committing suicide." USTC points out that no retailer testified that the company required shelf space allocations equal to its market share. Apparently, Wal-Mart rejected such a request from USTC.

However, according to Conwood, around 1990, USTC perceived it as a threat in the moist snuff market and took steps to eliminate it as a competitor and to "reject competition on the merits." USTC's president, Vincent Gierer, testified that around that time his company was losing market share and Conwood's volume was increasing. In the mid-1990s Conwood and Swedish introduced "price value" or half-priced brands of moist snuff. To show that USTC believed that such "price valued" products would erode its profits, Conwood points to a 1996 internal USTC report in which the company stated that one of its goals was to "[m]inimze the

growth in [price value] we have been experiencing over the past five years to the point where USTC can still grow the market and achieve desired growth for USTC." The report stated that USTC would "need to be more aggressive where [price value] has a higher share of the segment and will actively pursue strategies to limit the growth of the price value market segment."

Conwood also claims that USTC, in its role as category manager, deliberately provided false information to stores to exclude competitors from the market. For instance, David Waller, a wholesale distributor, testified that USTC has provided "skewed" national sales figures to retailers that do not always represent local product movement in stores. A report drafted by a division manager in Houston also shows that USTC sometimes provided false information to retailers to get them to maintain USTC's poor selling items while dropping competitors' products. Conwood employees also testified that USTC provided false information to retailers, such as by inflating actual sales data.

According to Conwood expert witness Robert Blattberg, an expert on category management and a professor of retailing at Northwestern's Kellogg Graduate Business School, many retailers consider moist snuff a small category and give it little attention. By "small," Blattberg explained that it is only consumed by about seven percent of the population, almost all male. However, it is a highly profitable item on a linear foot basis because it takes up so little space. He testified that no store, not even Wal-Mart, according to him the largest retailer in the world, has anyone solely devoted to the management of moist snuff. From reviewing USTC documents, he testified that USTC employees understood that retail category managers did not know as much as USTC did about pricing, product knowledge and profitability of the products. He stated that manufacturers often have access to data that retailers do not, such as Nielsen data, which tracks

product movement. He stated that because of their time constraints, retailers are most likely to delegate the task of category management with respect to such items as moist snuff. He testified that when a retailer does delegate category management responsibilities to a manufacturer, the latter has significant responsibility. The retailer will look to the manufacturer to provide such information as assortment recommendations for which items to stock, consumer information, sales, and which stores are stocking what items. He further testified that a retailer will rely on a large manufacturer to be its category captain because if a manufacturer controls 75 or 80 percent of the market many retailers will assume that the manufacturer will and can devote the resources to the category to help build it. For instance, Blattberg pointed to documents in which a USTC representative stated that "most retailers want the top dog running things because the dominant share of market customers will look to us for leadership."

Swedish's McClure also testified that "[t]here's only one category manager in the moist snuff business"—USTC. He also stated that while he would like to compete for the job of category manager, his company does not have shelf presence, consumer base or money. He also testified that USTC had not used its position fairly, had used its power "to keep [Swedish's] products off the shelf, and once it's there to get rid of it . . . ."

Terry Williams, Conwood's national sales manager, testified that in 1997 he was informed by one retailer that in order to obtain extra facings or a facing for a new item, the retailer first would have to consult with USTC. He also testified that before 1997, Conwood's market share in Wal-Mart was approximately 12 percent, but by the time of trial it was 6.5 percent. He explained that USTC's exclusive racks and its restrictions on Conwood's distribution began in Wal-Mart around 1997.

There is also documentary evidence that USTC sought to use its position as category manager to control and limit the number of price value products introduced in stores and to control the merchandising and POS placements in stores. In one 1997 report, a USTC regional vice president stated that "[i]t is imperative that we continue with this Category Management action plan to eliminate competitive products." In another document, a 1998 letter to David Untiedt, USTC national accounts director, a USTC employee stated that his biggest competitive concern with several stores in the Washington state area was the "availability of [Swedish's] Timberwolf [brand] and price differential between" that product and USTC's. The letter went on to state that "[a]lthough we control the merchandising and the POS placements, which will make the consumer awareness of the price differential difficult, some of the Circle K shoppers are always looking for a bargain." After reviewing this document, Blattberg testified that USTC apparently realized that customers were looking for a bargain, and that limiting the amount of POS and information makes it more difficult for the consumer to find price value brands. In yet another document Blattberg discussed, a USTC chain accounts manager in North Carolina wrote "Our objective with exclusive vending rights with this and other chains is to control expanded competitive distribution and competitive POS . . . we will continue to focus on merchandising rights to promote the growth of our product line and inhibit competitive growth . . . to the best of our ability." Blattberg testified that the obvious objective in having exclusive vending rights, according to the letter, is to reduce the amount of competitive items that can be offered.

According to Blattberg, documentary evidence showed that USTC intended to use its position as category captain to "control the number of price value product introductions." Blattberg testified that after reviewing numerous documents drafted by USTC staff, he saw instances where USTC

provided misleading information to retailers, including falsely reporting that some of their products were selling better than their competitors in an effort to thwart competition. He testified that by limiting the availability of the price value brands, USTC limits the choices for consumers. He also testified that it limits the ability of competitors to enter the market because it limits what the consumer can see. He stated that USTC's practices were inconsistent with the concept of category management.

Kamien also testified that USTC's conduct harmed consumers by limiting variety and raising prices. He produced a chart showing that for every 10 percent increase in USTC facings, retail prices for moist snuff rose by $.07. A Wal-Mart manager testified that after USTC eliminated competitors' POS and facings, the number of other moist snuff items available to the store's customers declined.

Conwood introduced numerous documents drafted over several years by various USTC personnel, including chain accounts managers and others, that indicate USTC may have used its exclusive vending rights to hurt competition. *See e.g.*, J.A. at 2182 ("objective with exclusive vending rights with this and other chains is to control expanded competitive distribution and competitive P.O.S. Department . . . . We will continue to focus on merchandising rights to . . . inhibit competitive growth (to the best of our ability));" J.A. at 2185 ("We stressed in our Department Meeting the importance of cutting competitive distribution. In many stores, especially supermarkets, distribution of competitive brands is much too high . . . ."); J.A. at 2375 ("Even though Conwood does not like the fact that we sometimes house their product in our vending, I have encountered more and more retailers that are surprised when I include the comp[etitions'] products. I feel it is better for them to be lost in our vending th[a]n to have their own and no point of sale on the vendor."); J.A. at 2401 ("Our objective is to control the smokeless home, . . . provide

facings for competitive, control facings and positioning, and make our presence larger via P.O.S."); J.A. at 2523 ("With arrogance and grace, I have taken a personal vendetta against the Conwood Reps. in my areas. I am devoting an extra effort toward eliminating as many laggard Conwood brands at retail as possible . . . Since I am offering a cash counter payment for exclusive UST vending on our 2908 displays, I am giving Kodiak . . . [a Conwood brand] one facing . . . .").

In 1998, USTC introduced its Consumer Alliance Program ("CAP"), which entails granting retailers a maximum discount of .3% for providing USTC with sales data, and participating in USTC promotion programs, and/or giving the best placement to USTC racks and POS. According to Conwood, however, CAP is another means by which USTC excludes competition. For example, in "a monthly competitive letter" dated March 27, 1998, a USTC employee stated that the CAP "has become a great incentive in securing space for our vendors and for the elimination of competition products."

There was testimony that the CAP can be used to exclude competitive POS advertising, and that USTC was extremely successful in signing up retailers to enter into these agreements. In the first couple of months of the program, USTC was able to sign 37,000 retailers to the CAP, which represents 80 percent of its overall volume in moist snuff sales.

Unauthorized Removal of Conwood Racks

According to Conwood, when USTC sales representatives restocked or rearranged their own displays, they would routinely discard hundreds of thousands of Conwood racks and their accompanying POS. William Rosson, Conwood's Chairman, testified that after 1990, Conwood spent $100,000 a month on replacement racks. Rosson testified that the company had "monumental problems" keeping their moist snuff on the shelf. A Conwood sales representative testified

that when displays were removed, Conwood was successful in restoring them about 95 percent of the time. Rosson testified that about 50 percent of sales representative's staff time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks.

Conwood also asserts that USTC would remove its POS and racks under the guise that retailers had given it permission to do so. Conwood argues that any permission to remove its products was done under a ruse of organizing or straightening stores. It argues that USTC supervisors trained their staff to take advantage of inattentive store clerks, apparently so that they could destroy Conwood's racks and headers in retail stores. For instance, Shawn Ulizio, a former USTC employee testified that most clerks did not understand or care that there were different manufacturers of snuff products. Another former USTC sales representative testified that after he got permission from a store manager, he would remove Conwood racks and put Conwood's products in USTC racks. Former USTC representative Lawrence Borrowdale testified that he was instructed, apparently by his supervisor, that if a competitor's rack was in the way, he should remove it. Borrowdale testified that on occasion he would remove competitors' racks and bag up their fresh products and place them under a counter. Several other former USTC employees gave similar testimony. Kamien testified that the documentary evidence showed that the problem of USTC removing competitors' racks was widespread over a period of time.

One Conwood employee testified that except for moist snuff, he never encountered problems with his displays regarding any Conwood product. He testified that he would place moist snuff racks in stores only to return later to have

the displays gone and any remaining Conwood brands stuffed in USTC's rack. Another Conwood employee gave similar testimony. He also stated that once the USTC representative in his area told him that he intended to "bury" him. Later, he witnessed that same representative breaking down his rack one day, while USTC's regional vice president, then a USTC department manager, observed. Conwood did not encounter this problem with its displays of smokeless tobacco products in markets in which USTC did not compete.

Gayleen Rusk, who manages an Amoco Pronto Express, testified that she had experienced a USTC sales representative removing Conwood's racks and putting the products in the USTC rack. She testified that when she first started working at the store and did not know any better, she would allow it. Upon learning that the USTC representative was not supposed to bother competitors' racks, she would tell him not to do so when he visited the store. She stated that he would then come when she was not on duty and remove Conwood's rack anyway. Regarding the effect of not having Conwood brands in her store, Amoco manager Rusk stated that when customers request the items, they do not have them to sell. According to Conwood representative Brett Jeffery, when he told the USTC representative to stop removing his racks, Conwood's sales "dramatically increased." One former USTC representative, who witnessed the removal and destruction of Conwood's POS and racks stated that it had an effect on sales. According to him, no exposure meant no sale. Three other store witnesses also testified that they had seen or experienced USTC representatives removing Conwood racks.

According to USTC, however, retailers rely on manufacturers and wholesaler representatives to perform certain merchandising tasks for them, such as cleaning and rearranging items where a retailer may require more space to add or expand a section. USTC claims that during the 1990s, its more than 600 sales personnel visited 8 to 10 retail stores per

day, totaling more than 7 million sales calls. These visits may involve, among other things, removing a competitor's products, racks, or POS, but only at the retailer's direction. USTC also points out that three of the former USTC employees that said that they removed Conwood racks and/or displays at the direction of their supervisors testified that they did so with the retailer's permission. Further, one had not worked for USTC since 1987, before the challenged conduct began. USTC concedes, however, that four witnesses testified that they removed racks and POS materials without retailer authorization. Further, Conwood sales representatives testified that their USTC counterparts told them they had orders from their supervisors to eliminate Conwood racks or facings, and in some cases, their compensation or bonuses depended on such rack destruction.

Damages

Rosson testified that had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent. Rosson testified that he had carefully tracked Conwood's market share over the past 20 years. Conwood's actual market share in its first 10 years in the moist snuff industry was 11 percent. In the next decade, starting from 1990, that figure increased by roughly 2.5 percent. Rosson testified that the lack of growth that occurred during the second decade largely resulted from USTC's tactics. He testified that his numbers are based on his studying markets where the company had a foothold and those in which it did not. In places where the company had a "foothold," i.e., a relatively high market share in a given area, it saw its market share increase during the 1990s to a market share above 20 percent. Rosson testified that each additional point (one percent) of market share translates into approximately $10 million in annual profits.

Williams testified concerning Conwood's market share with respect to the ten retail locations for which USTC offered evidence at trial. In those locations where USTC did not have rack exclusivity, Conwood's moist brands market share was well above its national average. For those locations where USTC had rack exclusivity, Conwood's market share was below its national average. Conwood argues that from these figures, a jury could have concluded that in unimpeded competition, Conwood's market share would have been approximately 25 percent instead of 13.5 percent nationally.

Finally, to prove damages, Conwood relied on the expert testimony of Professor Richard Leftwich of the University of Chicago Graduate School of Business, who is recognized as an expert on business valuation and lost profits. Leftwich apparently tested Rosson's hypothesis that Conwood's market share increased in areas in which it did not face USTC exclusivity.

Using a regression analysis, Leftwich found a statistically significant difference between states in which Conwood had a foothold and those in which it did not. Under Leftwich's model, in states where Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an additional 8.1 percent from 1990 to 1997. In states where Conwood's market share in 1990 was at least 15 percent, it grew an additional 6.5 percent. In states below these thresholds, Conwood's growth was considerably lower. As the district court noted:-

> Leftwich applied a regression analysis to test Conwood's hypotheses. He determined that Conwood's share in a state in 1990 is statistically related to the change in Conwood's market share between 1990 and 1997. The regression model predicts that where Conwood had a higher market share (e.g. 15-20%) in 1990, Conwood's market share grew during the period 1990 to 1997. In

> contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little.

(J.A. at 87-88.)

Leftwich then determined that Conwood's low market growth was due to USTC's behavior. Leftwich's model also found that increases in USTC's exclusionary behavior in a state reduced Conwood's share of sales by a statistically significant amount. He found that Conwood's damages as a result of USTC's actions amounted to a figure between $313 million and $488 million, depending on whether Conwood's market share would have grown by 6.5 percent or 8.1 percent. The jury awarded damages of $350 million.

DISCUSSION

I.

This Court reviews a district court's denial of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) *de novo*. *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997) (citing *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir.1996)). "In a federal question case, the standard of review for a Rule 50 motion based on sufficiency of the evidence is identical to that used by the district court. The evidence should not be weighed, and the credibility of the witnesses should not be questioned." *Williams*, 132 F.3d at 1130-31. Further, the evidence is viewed in the light most favorable to the non-movant, and all reasonable inferences are drawn in that party's favor. *Id.* at 1131. This Court should grant the motion only if "reasonable minds could not come to a conclusion other than one favoring the movant." *Id.* Our task also embodies assuring that the district court "indulge[d] all presumptions in favor of the validity of the jury's verdict," and "refrain[ed] from inter-

fering with [the] jury's verdict unless it [was] clear that the jury reached a seriously erroneous result." *Id.* (citing *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir.1996)).

This court considers the district court's decision to admit or exclude expert testimony for abuse of discretion, recognizing, of course, that such review calls for deference to the district court's decision. *See Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-139, 143 (1997)). Thus, we will reverse a district court only where we are left with a definite and firm conviction that it committed a clear error of judgment. *Singleton v. United States*, 277 F.3d 864, 870 (2002) (citing *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir.1999)).

II.

USTC argues that the evidence presented at trial amounted to no more than "insignificant" tortious behavior and acts of ordinary marketing services. It contends that tortious activity cannot form the basis for liability under the Sherman Act unless "that activity is pervasive and accompanied by other anti-competitive conduct." USTC also argues that Conwood failed to show that it was foreclosed from the market, was unable to compete for shelf space, that competition among moist snuff suppliers was injured, or, generally, that any harm alleged was caused by anything other than competition itself. It contends that its category management services and promotional programs are common marketing practices. These services, among other things, (1) enhance demand for USTC's products and help to ensure that retailers use shelf space efficiently, (2) build consumer loyalty, and (3) improve presentation of the products. USTC states that trial testimony showed that, during the relevant period, retailers retained control of shelf space allocation, and which racks and POS materials were used. Further, during the relevant period

(1990-1998), it argues that market output increased, its competitors' market shares doubled, and Conwood's sales and profits grew.

Conwood argues that the evidence in this case was sufficient to support the jury's verdict. Conwood contends that the jury heard and rejected USTC's argument that its conduct was ordinary "demand enhancing" business behavior. It argues that the evidence showed an "orchestrated USTC campaign to eliminate rival distribution and promotion with no competitive justification." Conwood argues that while USTC points to increased sales in the moist snuff market, it ignores the fact that in the "but for world of unimpeded competition, consumers and Conwood would have done substantially better." We agree with Conwood, and despite USTC's arguments in support of its position, we believe there was sufficient evidence to support the jury's verdict.

III.

A claim under § 2 of the Sherman Act requires proof of two elements: (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to "growth or development resulting from a superior product, business acumen, or historic accident." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 (1985); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). "To establish the offense of monopolization a plaintiff must demonstrate that a defendant either unfairly attained or maintained monopoly power." *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986) (citation omitted); *Beverage Mgmt., Inc. v. Coca-Cola Bottling Corp.*, 653 F.Supp. 1144, 1151 (S.D. Ohio 1986). "Monopoly power consists of 'the power to control prices or exclude competition.'" *Potters*, 800

F.2d at 574 (citing *Grinnell*, 384 U.S. at 571). "An attempted monopolization [under § 2] occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition." *Smith v. N. Michigan Hosps., Inc.*, 703 F.2d 942, 954 (6th Cir. 1983) (citations and internal quotation marks omitted). In a § 2 case, "only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful." *Byars v. Bluff City News Co.*, 609 F.2d 843, 860 (6th Cir. 1979) (citations omitted); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992) ("This Court has preferred to resolve anti-trust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (citations and internal quotation marks omitted). Moreover, in order for a "completed" monopolization claim to succeed, the plaintiff must prove a general intent on the part of the monopolist to exclude; while by contrast, to prevail on a "mere"attempt claim, the plaintiff must prove a specific intent to "destroy competition or build a monopoly." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 101 (2d Cir. 1998). However, "no monopolist monopolizes unconscious of what he is doing." *Aspen*, 472 U.S. at 602. Thus, "[i]mproper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." *Id.* at 603 (citation omitted).

The first step in any action brought under § 2 of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268-69 (2d Cir. 1979). "A geographic market is defined as an area of effective competition." *Re/Max*, 173 F.3d at 1016 (citation omitted). "[I]t is the locale in which consumers of a product or service can turn for alternative sources of supply." *Id.*

In the instant case, USTC does not challenge that it has monopoly power; nor is there an issue as to the relevant product (moist snuff) and geographic markets (nationwide).[2] On appeal, USTC contends that Conwood has failed to establish whether USTC's power was acquired or maintained by exclusionary practices as opposed to its legitimate business practices, and a superior product. *Aspen*, 472 U.S. at 595-97. In determining whether conduct may be characterized as exclusionary, "it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605. "If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary.]" *Id.* However, merely because an entity has monopoly power, does not bar it from taking

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[2] Whether a company has monopoly or market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." *Tops Market*, 142 F.3d at 97-98 (citation omitted); *see also Re/Max*, 173 F.3d at 1016 (citation omitted). "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so." *Byars*, 609 F.2d 843, 850 (citations omitted). Courts have increasingly leaned toward using circumstantial evidence as a shortcut to determine whether monopoly power exists. *Re/Max*, 173 F.3d at 1016. Such circumstantial evidence may encompass a high market share within a defined market. *Id.* at 1018. At trial there was evidence that USTC enjoyed 74 to 77 percent market power nationwide in the moist snuff industry. As previously stated, USTC neither challenges this finding nor argues that it does not possess monopoly power. To that end, we agree with USTC that the monopolization and attempt to monopolize claims are coterminous inasmuch as USTC concedes monopoly power. *See Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 85 (2d Cir. 1981) (explaining that where *ability* to exclude entry and control prices is present, the two offenses are coterminous).

advantage of its scale of economies because of its size. *Id.* at 597. Such advantages "are a consequence of size and not the exercise of monopoly power." *Id.*

USTC contends that none of the practices Conwood complains of amount to antitrust violations, but are no more than isolated sporadic torts. We disagree. Conwood presented evidence that beginning in 1990 USTC began a systematic effort to exclude competition from the moist snuff market. Conwood presented sufficient evidence that USTC sought to achieve its goals of excluding competition and competitors' products by numerous avenues. Conwood principally complains that USTC (1) removed racks from stores without the permission of store management and discarded and/or destroyed these racks, while placing Conwood products in USTC racks in an effort to bury Conwood's products and reduce their facings; (2) trained their "operatives to take advantage of inattentive store clerks with various 'ruses' such as obtaining nominal permission to reorganize or neaten the moist snuff section," in an effort to destroy Conwood racks; (3) misused its position as category manager by providing misleading information to retailers in an effort to dupe retailers into believing, among other things, that USTC products were better selling so that retailers would carry USTC products and discontinue carrying Conwood products; and (4) entered into exclusive agreements with retailers in an effort to exclude rivals' products.

Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer. *See* 3A Areeda & Turner, Antitrust Law, ¶ 782(a), at 272 (2002). Business torts will be violative of § 2 only in "rare gross cases." *Id.* As USTC recognizes, however, this is not to say that tortious conduct may never violate the antitrust laws. *See e.g., Byars*, 609 F.2d at 854 n.30 (holding that acts by defendant, a

wholesale periodical distributor, against a smaller company attempting to compete against it, may be deemed exclusionary, including removing plaintiff's periodicals from sales racks at various retail outlets, covering up plaintiff's periodicals on racks so that prospective buyers could not see them, and disparaging plaintiff, his financial condition and the magazine's financial condition); 3A Areeda & Turner, *supra*, ¶ 782(a) at 272. Moreover, merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well. *Id.* at 271. "'Anti-competitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (reversing district court's dismissal of complaint and holding that radio station owner stated § 2 Sherman Act claim where defendants' anti-competitive conduct consisted of making misrepresentations to advertisers and the government in order to protect their monopoly).

USTC contends that the rack and POS removal activity was isolated and sporadic. It contends that the record identifies a *de minimis* number of improper incidents. USTC points out that it has 600 sales personnel which made approximately 8 to 9 million sales calls during the 1990s. It argues that the district court "disregarded the fact that conduct and circumstances "differed greatly from chain to chain and store to store." *See In re Airport Car Rental Antitrust Lit.*, 474 F.Supp. 1072 (N.D. Cal. 1979) (holding that rental car company would be required to prove damages on airport by airport basis for each airport for which plaintiff sought damages by reason of its exclusion).

In the instant case, the district court rejected USTC's argument, essentially describing it as impractical. At issue in this case are 300,000 separate retail establishments across the country. We believe the district court correctly determined

that to have required the parties to investigate activity at specific retail establishments would have been so costly as to have effectively ended this suit, despite substantial evidence of anti-competitive activity. In addition, "in an action for damages for violation of the antitrust laws plaintiff is [not] limited to recover only for specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate . . . based on relevant data and may act upon probable and inferential . . . proof." *Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 358 F.2d 790, 793 (6th Cir. 1966) (citation omitted).

It is undisputed that POS advertising and a manufacturer's ability to sell its moist snuff from its own racks are critical to success in the moist snuff market. *See Byers*, 609 F.2d at 860 (explaining that only a case-by-case analysis of each fact situation will determine whether the monopolist's conduct is anti-competitive). Because of restrictions on advertising in the tobacco industry, and the critical nature of POS advertising in the relevant market, efforts by USTC, a conceded monopolist, to exclude Conwood's racks and POS advertising from retail locations through any means other than legitimate competition could certainly support Conwood's § 2 Sherman Act claim. *See Aspen*, 472 U.S. at 605. Conwood presented evidence that USTC sales representatives continuously removed and discarded Conwood POS and racks after 1990 without store authorization. While the number of witnesses who actually testified was limited, the acts testified to were widespread. Douglas Hyaneck, a Conwood district manager, testified that when he served as a sales representative, he had trouble with rack removals in his stores in the northern Michigan area. He also stated that from the time he became a district manager until 1998, 40 to 50 percent of his sales staff's time was spent replacing racks. Gary Ryan, another Conwood sales representative in the Sikeston, Missouri area, says that about 1,200 of his racks were removed. He stated

that the problem continued even after a new USTC sales representative was hired in his area. Both men testified that their racks were removed by USTC sales representatives. John Falevsky, a Conwood sales representative in the Milwaukee, Wisconsin and Southeastern Wisconsin area, and Sales Representative Jeffrey Dring also testified about rampant incidents of rack removal by USTC representatives in their areas. Falevsky testified that he once approached his USTC counterpart about the matter and was told that the latter's bonus depended on how many Conwood racks he could get out of the stores. There is no indication that any of these acts were authorized by the stores at which they occurred. Morever, Rosson, Conwood's Chairman, testified that he would receive estimates that as much as 50 percent of his employees' time was being spent on repairing damaged or discarded racks. He stated that some months, beginning in 1990, Conwood was spending as much as $100,000 a month to replace racks, which constituted as many as 20,000 racks a month being replaced. USTC did not challenge any of this evidence at trial. Construing the evidence in the light most favorable to Conwood, these incidents were neither sporadic nor isolated. *Cf. Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) (holding that "'sporadic activity' identified by the plaintiffs does not amount to an antitrust violation").

In terms of retailer testimony, Gayleen Rusk, who manages an Amoco Pronto Express, testified that she had experienced a USTC sales representative removing Conwood's racks and putting its products in the USTC rack. She testified that she allowed it to happen when she first started working at the store because she did not know any better. Upon learning that the USTC representative was not supposed to bother competitors' racks, she would tell him not to do so when he visited the store. She stated that he would then come when

she was not on duty and remove Conwood's rack. Three other store witnesses also testified that they had seen or experienced USTC representatives removing Conwood racks.

Conwood also alleged that USTC used its role as category captain and/or manager to exclude competition. USTC points out that retailers testified that they alone, not USTC, determined and controlled what racks and POS were used in their stores. Conwood's Rosson admitted that he could not name one store that gives final decision-making power over its snuff section to his company's competitors. Other retailers verified this assertion. Kroger's Luckett testified that USTC did not receive all the facings in the plan-o-grams that it requested and that Kroger's retains ultimate authority about product placement. Retailer Paul McGuire also testified that he welcomed input from suppliers but retained final authority about product placement.

However, there was other evidence, which USTC ignores, that USTC used its position as category manager to exclude competition by suggesting that retailers carry fewer products, particularly competitor's products; by attempting to control the number of price value brands introduced in stores; and by suggesting that stores carry its slower moving products instead of better selling competitor products. Much of the evidence Conwood highlights was documentary, interpreted by experts. However, that evidence is nevertheless probative of USTC's intent to exclude competition.[3]

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[3] USTC complains that Conwood was allowed to rely on numerous hearsay documents that detailed conduct that is routinely rejected as not being very probative of anti-competitive intent and that showed nothing more than statements about competitive objectives. However, experts are entitled to rely on documents, even hearsay documents that are otherwise inadmissible. *Kingsley Associates, Inc. v. Del-Met, Inc.*, 918 F.2d 1277, 1286-87 (6th Cir. 1990) (holding that Federal Rules allow experts to base their opinions on hearsay and other evidence otherwise inadmissible at trial).

In one such instance, Blattberg opined that an e-mail sent by a USTC regional vice president and USTC director of national accounts showed that the company abused its position of category manager. The e-mail stated that USTC believed it could continue to be the category captain in certain stores in the Texas area, and "we may be able to control the number of price value product introductions and their pursuit of a private label brand." (J.A. at 1610.) Blattberg testified that the significance of this document is that it shows that USTC planned to control competition. It shows USTC intended to control the number of price value brands and other products, which he stated meant that if USTC could convince retailers not to stock those items, the result would be to prevent rapidly growing or lower priced items from entering the marketplace. He testified that this is not consistent with the concept of category management, which is based on trust.

As for other abuses, Blattberg noted that the 1997 weekly activity report from a USTC division manager in Houston to a department manager stated that the company was receiving pressure from retailers to drop "Flavor Packs" in accounts where USTC was discontinuing competitive brands due to slow movement. (J.A. at 2559.) The report states:

> Last week at Fiesta Supermarkets, I was able to get them to drop all competitive brands (12 total) and keep only Redwood and Kodiak. The buyer argued with me that we should be dropping Flavor Packs too because FP are selling less than most of the products we discontinued despite our counter displays. We were able to maintain our counter display and the product, but he makes a very valid point that we are not being total [sic] honest with our partners when we sell them on share for space concept if we don't include our poor selling brands in the mix. I am afraid that we are using up our partnerships and good will when we talk about partnerships and sell

> our concept only to turn right around and ask them to go against what we just convinced them was in their best interest just to keep Flavor Packs in account.

Id. Blattberg testified that this document shows that USTC tried to gerrymander the data to this retailer. (J.A. at 1614.) Again, he opined that such practices violate the trust central to a category management relationship. Further, such evidence counters USTC's argument that only retailers controlled facing decisions.

Conwood does not appear to challenge USTC's role as category manager *per se*, but rather the manner in which it used its position as a monopolist providing category management services, i.e., to exclude it from competition. *See Aspen*, 472 U.S. at 605 (explaining that excluding rivals on a basis other than efficiency may be characterized as predatory or anti-competitive); *see also Eastman Kodak*, 504 U.S. at 483 (holding that under the willful-maintenance-of-monopoly power prong, defendant's liability in § 2 Sherman Antitrust claim turned on whether defendant could present a "valid business reason[] for its exclusionary conduct").[4] As

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[4] To the extent that USTC complains that evidence of its unlawful anticompetitive conduct, and its lawful conduct to take advantage of scale of economies, offer category management services or engage in other promotional activity in general were commingled, the district court properly instructed the jury that USTC could not be held liable for conduct that was part of the normal competitive process. The jury is deemed to have followed these instructions. *Aspen*, 472 U.S. at 604-05. In addition to that argument, USTC also contends that Conwood has failed to show that its practices foreclosed competition. It further contends that its exclusive dealing arrangements with retailers cannot be invalid, absent a "particularized showing of unreasonableness." *See. e.g., Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993) (explaining that a complaint that alleges, *inter alia*, no more than exclusive dealing arrangements may be susceptible to dismissal for failure to state a claim). However, Conwood's claim is broader than merely challenging the exclusive agreements USTC entered into with retailers for exclusive racks. As explained in the text of this opinion, among other things,

explained above, Conwood presented evidence that the category management program was used to place USTC racks exclusively in retail stores and hide competitor products in its racks. *See e.g.*, J.A. at 2375 ("Even though Conwood does not like the fact that we sometimes house their product in our vending, I have encountered more and more retailers that are surprised when I include the competition's products. I feel it is better for them to be lost in our vending then to have their own and no point of sale on the vendor.").

USTC's chairman Gierer testified that if his company's "goal . . . was to go into a store and reduce . . . competitive facings, then that shouldn't have happened. That's not a legitimate goal." Yet, Gierer later admitted that his company had endorsed a "strategy of eliminating competitive distribution." (J.A. at 2024.) Despite USTC's claims that its actions amounted to no more than competition and that "everybody does it," Gierer admitted that he was embarrassed by some of the testimony presented at trial, especially the testimony of Mr. Untiedt, USTC's director of national accounts, who apparently could not answer whether it was appropriate to mislead retailers. Gierer further testified that as a result of the evidence presented at trial, he was going to conduct an investigation into his company's practices. Gierer essentially admitted that the activities about which Conwood

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Conwood presented evidence that USTC pervasively destroyed Conwood's racks, and used its monopoly power to misrepresent sales activity of moist snuff products for purposes of obtaining exclusive racks and to bury competitors' products therein, all of which affected competition in the moist snuff market. Moreover, Conwood's claims are distinguishable from those asserted in several of the cases USTC cites, wherein plaintiffs alleged that exclusive arrangements violated § 3 of the Clayton Act, 15 U.S.C. § 14 or other sections of the antitrust statutes. *See e.g., Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (holding that "[o]nly those arrangements whose 'probable' effect is to 'foreclose competition in a substantial share of the line of commerce affected' violate Section 3").

complains, particularly the misrepresentations to retailers to obtain exclusive vending, was not competitive conduct spurred by efficiency. Moreover, USTC has failed to offer any valid business reason for its representatives' pervasive destruction of Conwood racks. Instead, it merely has chosen to argue that such destruction can never form the basis for an antitrust claim.

The evidence Conwood presented in this case regarding USTC's exclusionary conduct must be considered in the context of Conwood's theory. *See Caribbean Broad. Sys.*,148 F.3d at 1087. The theory Conwood advanced at trial is that USTC engaged in a concerted effort, directed from the highest levels of a national monopoly, to shut Conwood out from effective competition through the elimination of its racks and POS advertising, all in the unusual moist snuff market, where POS is the central marketplace battleground. *See e.g., R.J. Reynolds Tobacco Co. v. Phillip Morris Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999) (granting preliminary injunction barring cigarette manufacturer in § 2 action from implementing program with retailers that would allow its product to hold most visible position in sales racks; and noting that in cigarette market product visibility and advertising at the point of purchase are essential to remaining competitive). There was ample documentary and testimonial evidence supporting this theory. The jury could have found, and apparently did find, that USTC's pervasive practice of destroying Conwood's racks and POS materials and reducing the number of Conwood facings through exclusive agreements with and misrepresentations to retailers was exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct. Therefore, the district court did not err in holding that there was sufficient evidence for a jury to find willful maintenance of monopoly power.

IV.

USTC argues that Conwood has failed to show that it or competition was harmed in the national moist snuff sales market. It argues that there was no injury to competition because the number of moist snuff brands actually increased during the 1990s, including the price-value products. It also argues that no injury to competition in the moist snuff market is shown because during the same period, other tobacco products decreased. USTC argues that where the market has actually expanded, there can be no showing of injury to competition. Further, USTC argues that Conwood has failed to show injury. It argues that during the relevant period, Conwood's market share actually increased. It also argues that there were other factors in the market, such as retailers' choices not to display Conwood's racks and POS, that caused Conwood's injury.

Conwood counters that it produced expert testimony showing that USTC's exclusion of rivals' POS racks and facings caused an increase in prices, reduced sales and limited choice. It also claims that but for USTC's actions, the market would have grown more. Finally, it argues that the fact that its own profits increased during the relevant period is not dispositive of the issue of injury.

The antitrust laws are intended to protect competition, not competitors. *See Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern.*, 256 F.3d 799, 812 (D.C. Cir. 2001) (citation omitted); *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989) (citations and internal quotation marks omitted). To prevail, a "[p]laintiff[] must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Valley Prods. Co., Inc. v. Landmark, A Division of Hospitality Franchise Sys., Inc.*, 128 F.3d 398, 402 (6th Cir. 1997) (citation omitted). Specifically, to recover damages, an "antitrust plaintiff must

show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Id.* An antitrust plaintiff bears the burden of showing that the alleged violation was a material cause of its injury, a substantial factor in the occurrence of damage or that the violation was the proximate cause of the damage. *See Ezzo's Inv., Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 990 (6th Cir. 2001). As this Court stated,

> [a]lthough a plaintiff need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be provided as a matter of fact and with a fair degree of certainty. To be one of several causes is not enough. The evidence linking the violation to the injury must be more precise than that needed to establish the amount of damages.

Id.

USTC first argues that Conwood failed to show harm to competition in the market because output increased and new products were introduced into the market. There was evidence at trial that total market output increased in the moist snuff industry during the relevant period. Between 1990 and 1999, overall sales volume of moist snuff increased 16 million pounds. Also, during this period, new products entered the market, and by 1999, there were 40 brands of moist snuff, 24 of which came from USTC competitors. (J.A. at 474-76.) In *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), the Ninth Circuit held that antitrust plaintiffs had failed to produce "credible evidence to support their contention" that the defendant's actions had "deterred entry into this market," because during the relevant period industry output in the relevant market had substantially expanded. *Id.* at 1164; *see also Campus Ctr. Discount Den, Inc. v. Miami Univ.*, No. 96-4002, 1997 WL 271742, at *2

(6th Cir. May 21, 1997) (holding that convenience store plaintiff failed to state a claim under the antitrust laws because it failed to show that any alleged anti-competitive conduct on behalf of the defendant reduced overall demand for convenience store market).

Conwood, however, argues that the issue is whether the market would have grown more absent USTC's antitrust violation. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the evidence showed that following the defendant's alleged predation, output in the relevant market and market shares for others grew. *Id.* at 233-34. The Court stated, however, that the fact that the defendant's entry in the market did not restrict output was not dispositive. *Id.* at 234. "One could speculate . . . that the rate of growth would have tripled, instead of doubled [absent the] alleged predation." *Id.* at 234. However, the Court stated that there was no evidence that this was so. *Id.*

In the instant case, Kamien, Conwood's expert, testified that as a result of USTC's exclusionary conduct, the consumer suffered by having to pay higher prices, and that there was less variety in the market. (J.A. at 525.) The district court noted that much of the evidence regarding injury to competition was based, in part, on Kamien's testimony, which the jury obviously believed. Thus, although output in the moist snuff market grew, there was evidence showing that USTC's actions caused higher prices and reduced consumer choice, both of which are harmful to competition. *See Brooke Group*, 509 U.S. at 234. Conwood's market share did grow slightly between 1990 and 1998; however, growth during that period, which was about 2.5 percent, stands in stark contrast to the growth in market share of approximately 11 percent that Conwood experienced in the ten years prior to 1990. In addition, Swedish's chairman also testified that USTC's activity restricted its growth. He testified that USTC used its power "to keep [Swedish's] products off the shelf, and once

it's there to get rid of it . . . ." Thus, there was sufficient evidence that during the relevant period, the growth of two of the three other manufacturers of moist snuff aside from USTC slowed, and that the restricted growth resulted from USTC's conduct. In addition, Kamien testified that since 1990, no new firm had entered the moist snuff market, which he found odd because of the high amount of potential profit at stake in that market and the fact that USTC was the most profitable company in the country. He further testified that had there been true competition in the moist snuff market, USTC's market share, which dropped approximately 1 percent per year between 1979 and 1990, would have fallen much faster. We believe that construing the evidence in the light most favorable to Conwood, as we must, it was sufficient to show that competition suffered during the relevant period. *Williams*, 132 F.3d at 1131.

USTC also argues that its conduct was not the "necessary predicate" of any injury Conwood suffered, and thus Conwood cannot recover under the antitrust laws. USTC argues that any injury Conwood suffered was the result of retailers' decisions to enter into contracts with it and others to serve as category managers. For support, USTC primarily relies on *Valley Products*, 128 F.3d 398. In that case, a plaintiff who made and sold soap for use in hotels and motels under franchises granted by defendants brought suit under the Clayton Act, 15 U.S.C. § 15, when plaintiff was denied permission to continue using on its items logos owned by the defendants. *Id.* at 400-01. The defendants had ended their agreement with plaintiff after it granted two other manufacturers "preferred supplier status," which meant they alone could place the trademarks owned by one of the defendants on their amenities. *Id.* This Court affirmed the district court, which found that the plaintiff had not shown an antitrust injury. *Id.* at 400. This Court noted that to show antitrust injury, the plaintiff must show more than economic injury. *Id.* at 402. The Court stated that an analysis of the "the directness

or indirectness of the injury was appropriate." *Id.* at 403. The Court noted that an injury does not exist for purposes of antitrust suits if it does not flow directly from the antitrust violation. *Id.* The Court found no injury because the violation alleged was not the "necessary predicate" of the plaintiff's injury. *Id.* at 404. The injury did not flow directly from the defendants' actions, but rather, the plaintiff's loss of sales resulted from the cancellation of the agreement to use the trademarks, which defendants had a right to do, and not from any anti-competitive activity.

USTC argues in this case that Conwood's injury flowed from the retail agreements that granted exclusive rights to USTC and to others at the expense of Conwood. This argument is unconvincing because there was evidence that Conwood's injury flowed directly from USTC's unauthorized removal and destruction of its racks and POS. Conwood's Rosson also testified that USTC's activity restricted its growth. There was evidence that USTC and not retailers controlled facing decisions and that in making those decisions, USTC sales representatives purposely attempted to bury Conwood's products in USTC racks. (*See e.g.*, J.A. at 2375.) Further, there was evidence that USTC misrepresented the sales activity of its own products to retailers in order to increase the number of facings of its slower moving products despite the fact that other brands by its competitors, including those of Conwood, were better selling. Such activity encompasses the anti-competitive acts about which Conwood complains. Thus, there was sufficient evidence showing that Conwood's injury did flow from USTC's anti-competitive activity. *Valley Products,* 128 F.3d at 404. Further, while the link between the injury and violation must be "proved as a matter of fact and with a fair degree of certainty," it need not be the "sole proximate cause." *See Ezzo's,* 243 F.3d at 990. In sum, there was sufficient evidence for a jury to find that

USTC's anti-competitive activity harmed competition in the moist snuff market and Conwood; and USTC is not entitled to judgment as a matter of law on this ground.

V.

USTC challenges the district court's decision to allow Leftwich to testify as to the damages sustained by USTC's conduct. USTC argues that the district court made no findings regarding the admissibility of Leftwich's report under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). USTC argues that Leftwich's methodology fails because it was constructed solely for this case. USTC also argues that Leftwich's study did not attempt to segregate the effects of other factors that could have contributed to Conwood's low sales in some states, and it made no attempt to test whether the slow growth in certain states was causally linked to any of USTC's conduct. Thus, USTC argues the study did not and could not fit the case at hand.

As a preliminary matter, Conwood argues that USTC waived any challenge to Leftwich's testimony because after the district court ruled that Leftwich's testimony was admissible on a preliminary basis, the court explained that USTC could contest Leftwich's testimony at trial. Conwood asserts that because USTC failed to object to Leftwich's testimony at trial, it has waived our review of the district court's decision to allow Leftwich to testify. We disagree.[5]

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[5] However, apparently for the first time on appeal, USTC argues that Leftwich's regression model cannot be tested, is not subject to ascertainable rate of error and has no basis in the literature. These arguments were not raised below and may not be asserted now on appeal. *See White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) (noting that this Court reviews the case presented to the district court, and not a better one fashioned on appeal, and will not decide issues the parties failed to litigate before the district court).

USTC filed a motion in limine challenging the admissibility of Leftwich's testimony, and the district court correctly concluded that its admissibility was governed by the Supreme Court's opinion in *Daubert*. *See Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001). The district court considered USTC's arguments regarding admissibility under Fed. R. Evid. 702, pertaining to the admissibility of expert witnesses, and found that "Leftwich's testimony satisfies *Daubert*." (J.A. at 90.) USTC also argued that Leftwich's testimony should be excluded under Rule 403 because it lacked probative value and would mislead the jury.[6] Specifically, USTC challenged the factual assumptions that Leftwich tested. The district court held that it could not at that time say that Leftwich's assumptions had no basis in fact, but that USTC might prove differently at trial. In *United States v. Brawner*, 173 F.3d 966 (6th Cir. 1999), we held that where a trial court has made a definitive ruling on the record of the evidentiary issues to be decided, and has not indicated that the ruling is subject to other circumstances or evidence, then counsel need not renew the objection at the time the evidence is offered at trial to preserve the error for appeal. *Id.* at 970; *see also* Fed. R. Evid. 103(a)(2) (holding that once a court makes a *definitive* ruling on the record to either admit or exclude evidence, at or before trial, a party need not renew an objection at trial to preserve any alleged error for appeal). In the instance case, the district court's opinion unequivocally stated that "Leftwich's testimony satisfies *Daubert*." Moreover, after Conwood rested its case, USTC moved for judgment as a matter of law challenging the

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[6] Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

assumptions of Leftwich's damages theory. We therefore do not believe that USTC waived appellate review of Leftwich's damages theory.[7]

USTC does not challenge Leftwich's qualifications as an expert, but only his testimony and damages study. Pursuant to Rule 702 of the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ." Fed. R. Evid. 702. In *Daubert*, the Supreme Court "established a general gatekeeping [or screening] obligation for trial courts" to exclude from trial expert testimony that is unreliable and irrelevant. *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001) (citation and internal quotation marks omitted). The district court must determine whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." *Id.* (citation omitted). In assessing relevance and reliability, the district court must examine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) (citations omitted). This involves a preliminary inquiry as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the

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[7] We also note that even if USTC had failed to adequately preserve this issue, we would still review it for plain error, and USTC would only be entitled to relief if we determined that its "substantial rights" had been affected. *Brawner*, 173 F.3d at 970 (citations omitted). Regardless of whether we review the issue for plain error or for abuse of discretion, as we explain in the text of this opinion, we believe that the district court did not err in allowing Leftwich to testify regarding the damages Conwood sustained.

facts in issue. *Id.* (citation and internal quotation marks omitted). Some of the factors that may be used in such an inquiry include: (1) whether the theory or technique has been tested and subjected to peer review and publication, (2) whether the potential rate of error is known, and (3) its general acceptance. *Hardyman*, 243 F.3d at 260. "This inquiry is a flexible one, with an overarching goal of assessing the 'scientific validity and thus the evidentiary relevance and reliability' of the principles and methodology underlying the proposed expert testimony." *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (citation omitted). "[A] trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., LTD v. Carmichael*, 526 U.S. 137, 152 (1999); *see also Jahn*, 233 F.3d at 388 (explaining that *Daubert* made clear that Rule 702 relaxes the "traditional barriers" to admitting opinion testimony).

USTC presents no reasoned basis for us to find that the district court abused its discretion in determining that Leftwich's methodology was sufficiently reliable or relevant to survive a *Daubert* challenge. USTC asserts two principal challenges to Leftwich's study and testimony. USTC claims that Leftwich did not relate any of Conwood's loss to specific bad acts by USTC and failed to account for other factors that could have had a negative effect on Conwood's sales. Leftwich used a regression analysis to test Rosson's hypothesis that Conwood's growth was suppressed most in states where it had only a small market share when USTC began its exclusionary practices. He also tested whether the intensity of USTC's misconduct increased in or around 1990. Rosson testified that once his company reached a 15 percent market share, USTC's exclusive vending practices were not as effective.

Leftwich employed three methods to test Conwood's claims: regression analyses, a yardstick test and a before-and-after test. All three are generally accepted methods for proving antitrust damages. *See e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1238 (3d Cir. 1993) (explaining that if performed properly multiple regression analysis is a reliable means by which economists may prove antitrust damages); *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 207 (5th Cir. 2000) (noting that the two most common methods of quantifying antitrust damages are the "before and after" and "yardstick" measures of lost profits).[8]

Leftwich found a statistically significant difference in Conwood's market share between those states in which Conwood had a foothold and those in which it did not. In those states in which Conwood enjoyed a market share of 15 and 20 percent or more, Conwood grew in share, between 1990 and 1997, on an average of 6.5 percent and 8.1 percent, respectively. He concluded that but for USTC's exclusionary acts, Plaintiff's market share would have grown by these same amounts in non-foothold states. Contrary to USTC's arguments, the record indicates that Leftwich ruled out the possibility that the statistical relationship was caused by factors other than USTC's conduct. We find particularly relevant the undisputed evidence that Leftwich examined the possible explanations that USTC's own expert suggested as possible explanations

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[8] "The before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it [and] the yardstick test . . . consists of a study of the profits of business operations that are closely comparable to the plaintiff's." *Eleven Line, Inc.*, 213 F.3d at 207 n.17. A regression analysis looks at the relationship between two variables. *Rollins v. Fort Bend Independent School Dist.*, 89 F.3d 1205, 1210 n.6 (5th Cir. 1996). The point of a regression analysis is to determine whether the relationship between the two variables is statistically meaningful. *Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County*, 122 F.3d 895, 917 (11th Cir. 1997).

for Conwood's low market share. Leftwich testified that he tested all "plausible explanations" for his results for which he had data. Employing a regression analysis, Leftwich analyzed whether these other factors could explain Conwood's laggard growth in non-foothold states and concluded that they could not.

Leftwich also employed a before-and-after test to investigate Conwood's claims. Specifically, he tested whether the relationship between Conwood's share of moist snuff sales in a state and the rate of growth in Conwood's share of sales in that same state was the same or different for the seven year period before 1990 as it was for the seven year period after 1990. He found that Conwood's moist snuff market share did not grow significantly more in foothold states in the seven year period before 1990. Thus, there was no correlation in the pre-1990 period between Conwood's foothold status and market share growth rate.

Further, Leftwich employed a yardstick test to examine whether in the related loose leaf tobacco market, in which USTC does not participate, Conwood would always grow more in states where they started out with a high market share. He did not find a statistically significant relationship in Conwood's increase in market share in the loose leaf market between 1990 and 1997 and its share in 1990. In other words, where Conwood enjoyed a high market share or foothold in 1990 in the loose leaf market, it did not necessarily grow more in the period between 1990 and 1997.

USTC complains that Leftwich failed to take into account any USTC "bad act." However, this is not completely accurate. Using USTC's expert's own regression model, Leftwich used sworn affidavits compiled from 241 Conwood sales representatives detailing USTC's unethical activity in their areas. He used this information to construct three alternate measures of USTC's bad acts by state. (J.A. at 4415.) Thus, his damages study was relevant to the issues of

this case. *See Jahn v. Equine Servs*, PSC, 233 F.3d 382, 388 (6th Cir. 2000) (testimony is relevant where there is a valid connection to the pertinent inquiry).

USTC also complains that Leftwich's regression analysis ignored other market variables that could have caused Conwood's harm. However, as explained above, Leftwich ruled out all plausible alternatives for which he had data. Moreover, he accounted for all variables raised by USTC's own expert. In any event, "[i]n order to be *admissible* on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury." *Jahn*, 233 F.3d at 390 (emphasis added); *see also Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (failure to include variables will normally affect the analysis' probativeness, not its admissibility). In sum, after reviewing the record and giving due deference to the district court's decision, we believe that the district court did not abuse its discretion in concluding that Leftwich's study satisfied *Daubert* and allowing him to testify, subject to vigorous cross examination and an opportunity for Defendant to introduce countervailing evidence of its own. *See Daubert*, 509 U.S. at 596 (holding that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence") (citation omitted).

Finally, USTC contends that Rosson's testimony regarding damages and Leftwich's study were speculative and failed to support the damages awarded. We disagree. USTC essentially argues that a more rigorous standard of proof of damages was warranted. However, it is undisputed that USTC did not object to the jury instructions regarding damages. The jury was instructed that it could not award damages for injuries caused by other factors. As juries are presumed to follow the instructions given, we reject USTC's argument that

Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors. *See Aspen*, 472 U.S. at 604-05.

In addition, an award of damages may be awarded on a plaintiff's estimate of sales it could have made absent the antitrust violation. *J. Truett Payne Co., v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981). While USTC demands a more exacting standard, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id.* at 566. "The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections." *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 794 (6th Cir. 1970) (citation omitted).

We believe that there was sufficient evidence to support the jury's award of damages in this case. There was testimony that absent USTC's unlawful conduct, Conwood would have achieved market share in the mid-20s. For instance, Rosson testified that had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent. Rosson testified that he had carefully tracked the growth of Conwood's market share over the past 20 years, and its sharp decline in the 1990s was largely due to USTC's tactics. Williams, Conwood's national sales manager, also testified that in those stores where USTC practiced rack exclusivity, Conwood's market share was well below its national average. Such evidence supported Leftwich's damages analysis, and he estimated that Conwood's damages ranged between $313 million and $488 million. The jury awarded damages well within that range. Although USTC argues that there was evidence that undermined Rosson's testimony regarding whether USTC's conduct caused Conwood's injury, the jury heard all of the evidence presented to it, and apparently found other testimony

supporting the award of damages more credible. *South-East Coal Co.*, 434 F.2d at 794 (explaining that whether plaintiff's losses resulted from defendants' conduct or other market factors was for the jury to determine, as was witness credibility). In sum, we believe that there was sufficient evidence to sustain the award in this case.

CONCLUSION

The district court did not err in submitting this case to the jury and denying USTC's motion for judgment as a matter of law. Conwood presented sufficient evidence that USTC's conduct rose above isolated tortious activity and was exclusionary without a legitimate business justification. The evidence also sufficiently showed that USTC's actions injured Conwood and competition in the moist snuff market. Finally, the district court did not abuse its discretion in admitting the testimony of Conwood's damages expert, subject to cross examination and presentation of countervailing evidence. Therefore, we AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 19, 2002]

CONWOOD COMPANY, L.P., *et. al.*,
Plaintiffs-Appellees,

v.

UNITED STATES TOBACCO COMPANY, *et.al.*,
Defendant-Appellants.

ORDER

Before: *Clay and Gilman, Circuit Judges; and Edgar,** *District* Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel member but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

/s/ Leonard Green,
LEONARD GREEN, Clerk

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* Hon. R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

Civil Action No. 5:98-CV-108-R

CONWOOD COMPANY, L.P., *et al.*,
Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, *et al.*,
Defendants.

August 10, 2000, Decided
August 10, 2000, Entered

JUDGES: Thomas B. Russell, *Judge*, United States District Court.

OPINION

This matter is before the Court on Defendants' renewed motion for judgment as a matter of law (doc. # 366-1), and motion for a new trial (doc. # 366-2), or in the alternative, a reduced damages award (doc. # 366-3), and Defendants' motion for permission to conduct post-verdict juror interviews (doc. # 373). These motions are denied for the following reasons.

I. BACKGROUND

Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood"), brought this antitrust action against United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States

Tobacco Manufacturing Company, Inc. and UST Inc. ("UST"). Both Conwood and UST manufacture and sell moist snuff smokeless tobacco to retail stores throughout the United States. The United States moist snuff industry makes over $ 1 billion in profits a year. UST controls about 78% of the moist snuff market in the United States with its popular Copenhagen and Skoal brands. Conwood, which manufactures the Kodiak brand, among others, is its largest competitor with about 13% of the market. Only two other companies manufacture and sell moist snuff in the United States, Swisher and Swedish Match.

Moist snuff is sold to consumers at retail stores throughout the United States. Moist snuff comes in a small, round can. The cans are displayed in stores in plastic racks that sit on shelves or counters. The racks contain several slots or facings for different brands of moist snuff. The racks also contain an area where manufacturers can place advertisements. Each manufacturer will provide a rack to retail stores at no charge.

Conwood alleged monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2. At trial, Conwood alleged that, beginning in 1990, UST engaged in a campaign to limit the growth of competition that had begun in the 1980's. The price-value market of moist snuff had been growing in the previous decade. Conwood alleges that the strategy of UST executives was not to compete on price, but to limit the distribution at retail outlets of competing brands of moist snuff. Conwood presented UST documents supporting this allegation. Conwood executives and employees, some UST employees, other competitors and retailers testified about widespread conduct by UST that harmed competitors. This conduct included removing competitors' racks and point of sale advertising, which Conwood claimed was especially harmful because of

government restrictions on other forms of tobacco advertising. Conwood also presented proof that UST misrepresented facts to the retailers and used its position as the industry leader to influence retailers to use UST's racks exclusively and reduce the facings of competitors' brands.

UST was well-represented by counsel and vigorously defended these allegations. UST presented proof that the alleged conduct was ordinary business practice. UST also presented testimony of some retailers indicating that their decisions were made independently of any action by UST.

At the end of a jury trial that lasted over four weeks, the jury found Defendants guilty of antitrust violations. Pursuant to 15 U.S.C. § 15(a), the Court entered judgment in the amount of $ 1,050,000,000 in favor of Plaintiffs, treble the jury verdict of $ 350,000,000. Defendants have moved for either post trial judgment as a matter of law, Fed.R.Civ.P. 50(b), or a new trial under Fed.R.Civ.P. 59(a), or a remittitur.

II. STANDARDS

A. Judgment as a Matter of Law

UST is entitled to judgment as a matter of law if there is "no legally sufficient evidentiary basis for a reasonable jury" to find for Conwood. Fed.R.Civ.P. 50(a)(1). The Sixth Circuit has set forth the standard of review for a Rule 50 motion based on sufficiency of the evidence:

> The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted . . . only if reasonable minds could not come to a conclusion other than one favoring the movant.

K & T Enterprises, Inc. v. Zurich Ins. Co., 97 F.3d 171, 175-76 (6th Cir. 1996).

B. New Trial

Defendants are entitled to a new trial under Fed.R.Civ.P. 59 only if the jury reached "a seriously erroneous result." *Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Id.* at 1046. U.S. Tobacco argues all three points.

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000).

C. Remittitur

"A motion for a remittitur should only be granted if the award clearly exceeds the amount which, under the evidence in the case, was the maximum that a jury reasonably could find to be compensatory for the plaintiff's loss." *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988) (internal quotation marks omitted). "If there is any credible evidence to support a verdict, it should not be set aside." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990).

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants now seek judgment as a matter of law, claiming that Conwood did not prove a single element of its Sherman Act § 2 claim. The offense of monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished

from growth or development as a consequence of a superior product, business acumen, or historic accident." *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999) (citations omitted). U.S. Tobacco vigorously denies that any of its conduct constituted antitrust violations, and it further objects to the amount of damages that the jury awarded. Defendants argue that to let the judgment stand would "revolutionize" antitrust law. U.S. Tobacco's motion challenges each element of Conwood's monopolization claim. However, U.S. Tobacco does not specifically address the verdict in Conwood's favor on the attempt to monopolize claim.

At trial, UST twice moved for judgment as a matter of law/directed verdict. Both times, this Court found that Conwood had produced enough evidence for a reasonable jury to find in their favor. U.S. Tobacco's current motion for judgment as a matter of law reargues the same points it made to this Court in its motion for summary judgment and motions for directed verdict. The court previously ruled against U.S. Tobacco on the motions, and U.S. Tobacco has not demonstrated to this court why it now should find otherwise.

A. Existence of Monopoly Power

There are two ways for Conwood to establish that UST holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir.1979). The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. *Re/Max Intl., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999). "In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a 'shortcut.'" *Id.* The Sixth Circuit has noted that the "Supreme Court has concluded that an 87% share of the market and over two-thirds of the market both constitute [*8]

monopoly power under § 2." *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 821 (6th Cir. 1997) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

Conwood presented sufficient circumstantial evidence of monopoly power because UST had at least 74% of the relevant market. Conwood also presented other evidence of UST's control over prices or actual exclusion of competitors. During the alleged period of antitrust activity, no new competitors entered the market. And although UST's market share was shrinking somewhat, its decline slowed during the alleged period of anticompetitive conduct. UST had a very high profit margin and never lowered prices. UST vigorously argued against these allegations at trial, but a jury found otherwise. UST's high market share, coupled with UST's raising prices and high profit margins, and the fact that not a single new firm entered the moist snuff industry after 1990, indicate that it was reasonable for a jury to find that UST possessed monopoly power in the relevant market.

Furthermore, UST did not challenge specifically the jury's verdict in Conwood's favor on its attempted monopolization claim. In the attempt claim, Conwood did not have to prove that UST actually had monopoly power, but that there was a dangerous probability the UST would achieve its goal of monopoly power in the relevant market. The jury found that there was such a dangerous probability.

B. Willful Maintenance of Monopoly Power

The Court's instructions to the jury correctly stated the law on this element:

> Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or

> frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power . . . The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

U.S. Tobacco argues at length that its conduct does not rise to antitrust violations, but rather, constitutes ordinary business practices. U.S. Tobacco argued this to the jury. However, there was extensive evidence presented by Conwood that UST's conduct was not ordinary competition. Conwood presented evidence through witnesses and documents that UST had eliminated competitive distribution in stores, obscured the presence of competitor's advertising and products, and provided misleading data to retailers to obtain exclusive vending. Former UST sales representatives, Conwood sales representatives, and store witnesses testified that UST eliminated competitors' sales racks and point of sale advertising without retailer or competitor consent. Conwood witnesses testified that this activity was widespread. Internal UST documents supported Conwood's theories. Even some current U.S. Tobacco executives would not condone the alleged conduct and refused to say that it was "ordinary business conduct." It was for the jury to determine whether to believe UST's argument that "everybody does it," and it was reasonable for the jury to find that UST willfully maintained monopoly power through restrictive or exclusionary acts or practices.

The evidence supported Conwood's theory that UST's interrelated practices successfully limited competition. UST

once again attempts to divide the practices into discreet, distinct activities, each of which prior courts may have found to be lawful. The case law cited by UST is not persuasive. The moist snuff industry is unique compared to the snack food or soda industry. Point of sale advertising and visibility in the moist snuff industry is very critical because government restrictions severely limit other methods of advertising. *See R.J.Reynolds Tobacco v. Philip Morris, Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999). Defendants argue that no one instance of improper conduct standing alone would lead to § 2 liability. However, taken together, they show a pattern of exclusionary behavior sufficient to support the jury verdict.

C. Injury and Causation

The Court's instruction on this element correctly read:

> For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. . . . To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation

UST cannot demonstrate that it is entitled to judgment as a matter of law on this issue. Although UST makes legitimate arguments similar to those made to the jury, there is sufficient evidence for the jury to find for Conwood on this element. Both Conwood's chairman and Swedish Match's chairman testified that UST's conduct restricted their growth. Furthermore, Conwood presented expert testimony through Dr. Kamien that there was a direct relationship between the number of facings controlled by UST and higher prices for

consumers. Much of Conwood's proof on this element was based on the credibility of Kamien and Rosson. Apparently, the jury gave much weight to their testimony. Conwood also presented evidence that UST systematically removed their racks and facings, causing Conwood to lose sales. Although Conwood experienced some growth during the period of antitrust activity, its growth was sharply curtailed between 1990 and trial. All of these facts lead the Court to believe that the jury was reasonable in finding for Conwood on this element.

The Court also finds that the jury was reasonable in finding that UST's illegal conduct was a material cause of Conwood's injury. UST argues that other factors caused Conwood's decline in growth, such as the independent, uncoerced decisions of retailers, additional competition from other manufacturers and Conwood's failure to compete. UST ignores the evidence that it limited competitor's distribution without retailer consent. Nothing indicates that the jury did not consider UST's arguments.

D. Damages

The Court's instruction correctly stated the law:

> If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. . . . You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

As it did with Defendants' motions for directed verdict, the Court again rejects Defendants' argument that Conwood's proof of injury and damage is based on speculation. Although the court did characterize Plaintiff's damage proof as weaker than its proof of the other elements, UST is not entitled to judgment as a matter of law. The Court should not substitute its judgment for that of the jury where a reasonable jury could find for Conwood.

The jury awarded Conwood $350 million in damages. Although this amount is high, it is supported by a legally sufficient evidentiary basis. Conwood presented expert testimony through Dr. Leftwich that UST's antitrust activity caused between $155 and $488 million. Conwood's chairman's testimony also supported Leftwich's analysis. UST thoroughly cross-examined Leftwich about his opinions and theories, as well as Rosson. The high profit margins of moist snuff sales, the length of the antitrust activity and the decline in Conwood's growth support Leftwich's range of damages for lost profits. The fact that the jury awarded damages in the mid-range indicates that the jury adequately considered only those damages that were a direct result or likely consequence of UST's unlawful conduct.

In conclusion, while the Court may not have reached the same verdict, the evidence supports the jury's verdict. In their argument, UST ignores the primary factor that most likely results in an adverse verdict. At trial, UST's counsel and CEO clearly recognized that the videotaped testimony of several key UST employees was damaging. The CEO even testified that he was "embarrassed" by some of the testimony. While UST argued that such testimony was not reflective of their conduct and intentions, it is clear that the jury felt otherwise. Any reviewer of this record should observe the videotapes of the UST representatives presented by Plaintiff during their proof to have a true picture of their testimony.

IV. MOTION FOR A NEW TRIAL

To receive a new trial, Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Holmes v. City of Massillon*, 78 F.3d 1041, 1046 (6th Cir. 1996). U.S. Tobacco argues all three points.

The challenged verdict must be unreasonable before the Court can grant a new trial. *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000). The verdict was not against the weight of evidence. UST focuses on the evidence that supports its position. However, there was much contrary evidence supporting the verdict. Even if the Court feels that a verdict in favor of UST would have been more reasonable, it cannot set aside the jury verdict. *Id.*

U.S. Tobacco argues that the damages were excessive. The jury's damage award was well within the range that Conwood proved at trial. Once again, the court does not find that Conwood's damages evidence was mere speculation. Proving antitrust damages involves complicated matters of economics. Both parties had expert witnesses who gave contradictory testimony on damages. In such a case "where the jury was free to determine which expert to believe, this Court should not disturb the jury's decision." *See Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 506 (6th Cir.1998).

U.S. Tobacco claims that many of this court's rulings caused it to have an unfair trial. Neither party hesitated in providing numerous opportunities for the Court to make rulings of record. In each case the Court carefully considered the arguments of counsel and attempted to make fair rulings that followed the law. UST believes that this Court's rulings on its motion for summary judgment, motions in limine, and the Court's evidentiary rulings during trial were so erroneous that UST did not receive a fair trial. Obviously, this Court does not believe that its rulings were in error, or it

would not have ruled so. This Court will not revisit those rulings individually. UST may raise those issues on appeal.

V. REMITTITUR

Beside expert evidence that Conwood suffered no damages, U.S. Tobacco chose not to present alternate damage evidence. Now it seeks the Court to fashion a new award based on evidence that was never presented at trial. Conwood presented evidence that UST caused it to suffer over $450 million in damages. The jury awarded damages well within the range argued by Conwood. Plaintiffs motion for a remittitur is denied because the jury award is not "beyond the maximum damages that a jury reasonable could find to be compensatory for a party's loss." *Farber*, 917 F.2d at 1395.

VI. JUROR INTERVIEWS

Generally, the Court does not allow the parties to conduct post-trial juror interviews. Jurors provide a tremendous public service, especially to the parties and the court. The court reimburses jurors for their expenses, but they lose their income and their time from business, family and friends. The jurors in this case served faithfully for over four weeks. They should not be subject to further questioning absent good cause. Defendants have not demonstrated any compelling reason to contact jurors. Defendants argue that they only seek to gain an understanding of what marketing practices were unlawfully exclusionary. Plaintiffs have filed a motion for permanent injunctive relief. The Court's ruling on that motion will negate the need to interview jurors.

An appropriate order shall issue.

This is the 10 day of August 2000.

Thomas B. Russell
Judge, United States District Court

ORDER

Defendants having filed a motion for judgment as a matter of law, and a motion for a new trial, or in the alternative, a reduced damages award, Plaintiffs having responded, and upon consideration by the Court,

IT IS ORDERED:

Defendants' motion for judgment as a matter of law (doc. # 366-1), and motion for a new trial (doc. # 366-2), or in the alternative, a reduced damages award (doc. # 366-3) are DENIED. Defendants' motion for permission to conduct post-verdict juror interviews (doc. # 373) is DENIED.

This is a final and appealable order. There is no just cause for delay.

This is the 10 day of August 2000.

Thomas B. Russell
Judge, United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
W.D. KENTUCKY
PADUCAH DIVISION

No. 5:98-CV-108-R

CONWOOD CO., L.P. and CONWOOD SALES CO., L.P.

v.

UNITED STATES TOBACCO CO., United States Tobacco Sales and Marketing Co. Inc., United States Tobacco Manufacturing Co. Inc., and UST Inc.,

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Aug. 10, 2000

MEMORANDUM OPINION

RUSSELL, D.J.

This matter is before the Court on Plaintiffs' motion for a permanent injunction (docket # 374) and Defendants' motion for a hearing on Plaintiffs' motion for permanent injunctive relief (docket # 397).

As an initial matter, Defendants have not demonstrated that an oral argument on the motion for permanent injunction is necessary. A four week jury trial was held and the factfinder, the jury, found UST violated antitrust laws. This motion can be decided on the pleadings and court record.

In their motion for a permanent injunction, Plaintiffs have requested the following provisions: 1) UST shall not "eliminate, remove, deface, alter, obscure or otherwise manipulate any competitor's smokeless tobacco products, vending systems, counter displays or other advertising" unless it has written consent from the competitor; 2) UST shall not

influence others "by agreement, through financial incentives, misrepresentations or otherwise adversely affect the placement or selection of any competitor's smokeless tobacco products, vending systems, counter displays or other advertising;" and 3) UST shall appoint an independent committee of its board of directors to monitor and enforce compliance with the order.

Federal antitrust laws state, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. In seeking a permanent injunction under 15 U.S.C. § 26, Plaintiffs must demonstrate a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Bender v. Southland Corp.*, 749 F .2d 1205, 1214 (6th Cir. 1984). A jury already has determined that UST committed antitrust violations, and this court has rejected Defendants' posttrial motions to vacate or reverse the verdict. The evidence at trial and the jury verdict demonstrate that UST's strategic campaign to limit distribution succeeded in harming competition and consumers. The issue is whether UST's antitrust violations will continue or recur. *See* 15 U.S.C. § 26; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

The Court finds that it is likely that the violations will continue. In post-trial pleadings and public statements, UST refuses to admit that any of its business practices violate antitrust laws. UST maintains that it will not change the way it markets its products even in light of the jury verdict. Conwood has presented affidavits of its sales force that indicate that UST's campaign to restrict competitors' distribution has continued after the verdict. Because UST will not alter its business practices voluntarily, a court-ordered permanent injunction is necessary. *See United States v. Microsoft Corp.*,

97 F.Supp.2d 59 (D.D.C.2000) (ordering equitable relief where monopolist refuses to admit wrongdoing and will not alter conduct voluntarily).

The court may issue an injunction to restore competition, even if the injunction prohibits conduct that would otherwise be legal. *See United States v. Loew's*, 371 U .S. 38, 53 (1962). The Court has carefully considered Plaintiff's proposed order as well as Defendants' objections to its provisions. UST must cease certain anticompetitive conduct, but it is not necessary for the Court to appoint an independent committee to UST's board of directors to enforce compliance with the order.

An appropriate order shall issue.

ORDER FOR PERMANENT INJUNCTIVE RELIEF

Pursuant to 15 U.S.C. § 26, the Court orders that defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Manufacturing Company, Inc. and UST, Inc. and all persons acting in concert with defendants (collectively, "UST") shall be enjoined for a period of five (5) years as follows:

I. UST shall not:

(a) Eliminate, remove, deface, any competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including, but not limited to, "point of sale" advertising such as "header cards"), except with the prior written consent of the relevant competitor, such consent not to be unreasonably withheld, or unless directed to do so by the retailer.

(b) induce, influence materially cause or seek to cause any other persons, by agreement, through material misrepresentations to remove, deface, alter or otherwise adversely affect the placement or selection of any

competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including but not limited to "point of sale" advertising such as "header cards").

Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

This Order is based on 15 U.S.C. § 26, the accompanying Memorandum in Support of Plaintiffs' Motion for Permanent Injunctive Relief, the jury verdict, the trial record, and the pleadings and filings in this matter.

This Court shall retain jurisdiction to enforce this Order. This Order will be enforceable against all defendants in this lawsuit, and any and all other persons, affiliated or acting in concert with those persons. In the event that any part of this Order is violated by any of named defendants or other persons, the plaintiff may, by motion with notice to the attorneys for the defendants, apply for sanctions or other relief that may be appropriate.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., *et al.*
Plaintiffs,

v.

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.
Defendants.

MEMORANDUM, OPINION AND ORDER

INTRODUCTION

This antitrust case is before the court on the motion for summary judgment of defendant United States Tobacco ("UST") (Docket#208) and the cross-motion for partial summary judgment of Conwood Company (Docket #207). In this extensively litigated case, Conwood has challenged the moist snuff marketing practices of its rival UST. For the reasons set out below, the court concludes that only through the development at trial of a full factual record can there be an appropriate determination of whether UST's practices concerning exclusive racks and exclusive point-of-sale advertising constitute the illegal maintenance of monopoly power through anticompetitive practices. Likewise, market definition issues cannot be decided without a trial. Accordingly, the court will deny the motions for summary judgment.

FACTUAL BACKGROUND OF THE ANTITRUST LITIGATION

This case involves moist snuff,[1] a form of tobacco used orally by consumers by placing a small amount between the cheek and gum. The product is generally sold in round cans in retail stores, including convenience markets, mass merchandisers such as Wal-mart, and other outlets where snacks, sodas, cigarettes, and other convenience items can be readily bought. The cans are typically kept by the retailer in a gravity-fed rack, so that cans drop down through slots, also called "facings." These racks are often located by the check-out counter. The racks, in addition to storing the cans, also provide a place for point-of-sale advertising, sometimes referred to as "header cards." The number of slots in a rack is significant, as it affects not only the overall size of the rack but the number of products which a customer will see. As is common in consumer product merchandising, the placement of the rack, the arrangement of the point-of-sale advertising, and the display of competiting products within the racks are all areas of competition among moist snuff manufacturers. Each manufacturer wants its product displayed most prominently and strategically, and wants to maximize its point-of-sale advertising.

Point-of-sale advertising is commonplace in convenience merchandising, whether it involves colas, beer, snack foods, or other products. According to Conwood, however, it assumes an unusual importance in the tobacco industry, because of the significant limitations which state and federal law place on media advertising of tobacco products. While consumers can enjoy the antics of the Budweiser lizards or

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[1] There is an issue at trial concerning product market definition, but for purposes of this analysis, the court will restrict itself to a discussion of moist snuff. See opinion below at 15-16.

the Energizer bunny, there is no comparable television and radio exposure for tobacco companies. Thus, in the Conwood theory, point-of-sale advertising is especially critical because it represents the principal means of communicating with consumers. In the plaintiff's view, any restrictions on point-of-sale advertising are likely to have a seriously dampening effect on competition.

Conwood asserts that it moved from being a small player in the moist snuff market to presenting a significant challenge to UST, through the introduction of new "rough-cut" and "long-cut" products, through the introduction of different product packaging in the form of plastic cans with longer shelf lives, and through the introduction of price-competitive "price-value" products. These facts, if proven at trial, would tend to show the kind of "merits" competition which markets ideally provide, in which price and product innovation drive competition and provide benefits to consumers.

Conwood's proof developed in discovery, to some extent, tends to show that, in response to growth in the price-value market, UST engaged in a campaign, directed by high-level management, to "actively pursue strategies to limit the growth of the price-value market." Arguably, the strategy selected by UST management was not to compete on price (a strategy which apparently caused a stunning one-day drop in the market valuation of Philip Morris stock when it cut cigarette prices), but to limit the distribution at retail outlets of competing brands of moist snuff. This strategy, as Conwood paints it, was designed to "eliminate competitive distribution" and to seek "exclusive vending" and "vendor exclusivity."

Of course, generalized statements by corporate executives in internal documents do not by themselves constitute antitrust law violations. However, the proof which Conwood has developed through discovery could show that a highly focused UST campaign sought to have its vending racks be

the exclusive outlet for all moist snuff in retail stores. The effect of such rack exclusivity would be to give UST control over the point-of-sale advertising, since all header cards would have to be displayed on UST racks. In addition, such an arrangement, in which all products from all manufacturers are dispensed from UST racks, would tend to allow UST to reduce significantly the kinds and numbers of competitive products displayed by the retailer.

Conwood's discovery proof arguably demonstrates that UST's efforts to eliminate competing racks were significantly successful. This elimination of competing racks was accomplished through a variety of sophisticated techniques, including "crew drives," the use of the alleged subterfuge of "category management" services to small retailers as a method to elbow out Conwood and other competing products, and unilateral conduct such as UST sales personnel "cleaning up" the display areas. Conwood has developed evidence that it was the practice of UST sales personnel to obtain nominal permission to remove racks from harried and inexperienced convenience store employees who might lack the knowledge or gumption to resist the control which UST sales personnel exerted over the displays. Conwood also used explicit contractual agreements with retailers.

Conwood's proof further tends to demonstrate that the effect of these "exclusive vending" practices was to reduce the space allocated to moist snuff in retail outlets, to exclude competing advertisements at the point-of-sale, to increase slot width in the racks so as to make fewer consumer choices available, and to manage the presentation of products in the UST racks so that slow-moving UST products would "crowd out" price-value products by occupying scarce slots in the racks. In addition to an organized category management program, UST also pursued a Customer Alliance Program ("CAP") which arguably required preferred positioning for UST products and POS advertising.

The court emphasizes that it does not here find that Conwood will succeed in proving that these events occurred, or that they occurred to the extent alleged, but only that Conwood has raised sufficient factual basis for the issues to be presented at trial rather than rejected through summary judgment.

AN OVERVIEW OF THE PARTIES' ARGUMENTS

In a carefully and vigorously argued series of pleadings which focus on certain specific antitrust issues, UST asserts that Conwood has failed to make out a triable § 2 antitrust case against it. For purposes of the summary judgment motion only, UST does not challenge many of Conwood's factual predicates. UST, for example, does not contest in this motion that it possesses monopoly power, although it seriously disputes that it has acquired and maintained it willfully. (UST memorandum in support of summary judgment at p. 14.) Likewise, in its reply memorandum, UST does not contest that it has acted with the intent to eliminate as much competitive distribution as possible; that it has acted to obtain exclusive rack and rack-P.O.S. agreements with retailers; or that its conduct has made it difficult for Conwood to place its products and to increase its sales. (UST reply memorandum at pp. 5-6).

Instead of contesting directly many of the principal factual assertions, UST rather argues that, even under the best view of these facts which Conwood might prove, Conwood cannot establish either an antitrust violation or antitrust injury. UST contends that Conwood cannot establish any "exclusionary" conduct in violation of § 2 of the Sherman Act. (UST memorandum at p. 14). Rather than directly meet Conwood's factually detailed assertions of willful exercise of monopoly power, UST characterizes its practices as failing to meet a narrow test of § 2 violations. For example, UST argues that its exclusionary rack practices cannot be illegal because they do not constitute the kind of exclusive dealing which would

be condemned under other sections of the antitrust laws (see memorandum in opposition at pp. 17-21), and asserts that the other misconduct is nothing more than "ordinary business practices" (UST memorandum in opposition at pp. 25-37). UST continues this line of argument in its reply memorandum, contending that Conwood's case is a fatally thin "monopoly broth" which fails to prove any independent antitrust violation (UST reply memorandum at pp. 18 et seq.).

Conwood, in response to the UST motion, has prepared a highly detailed and possibly credible factual case based on extensive discovery, both documentary and by deposition. While it remains to be seen whether Conwood's assertion of the facts will be proven persuasively at trial to the jury, its factual chronology, if true, appears to assert an abuse—a willful exercise—of monopoly power by UST.

Conwood's case centers on a variety of interrelated practices which, in its view, constitute a coordinated, effective course of action by a monopolist which already enjoys a very high market share, profit margins among the highest in American industry, and limited competition without new market entrants. Most importantly, Conwood's version of the facts, if proven, could be interpreted by the jury to constitute a serious effort by a monopolist to suppress a competitor, not through competition on price, product innovation, or other merits, but based on exclusionary practices which are uniquely available to UST because of its longstanding market dominance. Moreover, Conwood contends, UST's practice of excluding Conwood from point-of-sale advertising is unusually effective because of the many restrictions which federal and state law place on the advertising of tobacco products; thus, restricting or eliminating point-of-sale advertising by Conwood arguably has an unusually restrictive impact on Conwood's ability to compete based on price, product innovation and design, and the like.

The court is very careful to note that it does not adopt or endorse Conwood's view of the facts. Whether Conwood can persuade a jury, after a trial with witnesses and experts, of the truth of its case theory is not for the court to say on summary judgment. The issue before the court now is whether a trial is the appropriate procedure to resolve these factually intensive and hotly disputed claims.

LEGAL STANDARDS AND ANALYSIS

Both Conwood and UST point to the same general standard to applied to § 2 claims, stemming from the venerable *Grinnell* decision of the Supreme Court. As the Sixth Circuit recently observed,

> The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Re/Max International, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999). Only the "willful acquisition or maintenance" part of the test is at issue, as UST assumes *arguendo* for summary judgment purposes that it possesses monopoly power. (UST memorandum at p. 14.)

It is the application of the *Grinnell-Re/Max* standard to these facts which is in dispute. UST vigorously argues that Conwood falls far short of the mark, and that its "monopoly broth" is really nothing more than "stone soup." In pressing this argument, UST repeatedly asserts that Conwood has not proven exclusive dealing by UST, that isolated incidents of bad behavior and "dirty tricks" in handling Conwood racks

are not the stuff of antitrust lawsuits, and that Conwood has pointed to nothing more than vigorous competition of the kind invited, not condemned, by the antitrust laws.

There are two shortcomings in UST's argument. First, its abstract treatise on antitrust laws sidesteps the carefully developed, thoroughly documented record which Conwood has amassed. Whether Conwood can prevail at trial on its theories is uncertain, but Conwood has marshalled a significant amount of proof that UST engaged in a concerted campaign, directed from the highest levels of UST, designed to shut Conwood out from effective competition at retail outlets through the elimination of Conwood racks, the elimination of Conwood point-of-sale advertising, all in an unusual market for tobacco products where point-of-sale is the central marketplace battleground. Second, as discussed below, UST's attempts to pick apart Conwood's arguments would have the court examine the leaves and ignore the forest, something not mandated by the antitrust laws.

"'Anticompetitive conduct' can come in too many forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Carribean Broadcasting System, Ltd. v. Cable & Wireless*, 148 F.3d 1080, 1087 (D.C. Cir. 1998). Thus, UST's "deconstruction" of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgement dismissal of this case. *Caldera , Inc. v. Microsoft Corp.*, Case No. 2:96-CV-645(B), 1999 WL 1067490 (D. Utah Nov. 3, 1999). Instead, the court should use as its touchstone well-accepted principles of § 2 law.

The key to the second prong of the *Grinnell* test is the use by a defendant of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States*

v. Griffith, 334 U.S. 100, 107 (1948)). The Supreme Court has directed the trial courts to condemn "exclusionary" or "anticompetitive" or "predatory" conduct, *see*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); the court must distinguish the improper "exclusionary" conduct from the permitted competition by a monopolist based on "superior product" and "business acumen," as permitted by *Grinnell*.

The distinction between the impermissible anticompetitive conduct by a monopolist and the lawful maintenance of its market share is based on determining if the defendant "has been 'attempting to exclude rivals on some basis other than efficiency.'" *Aspen*, 472 U.S. at 605, (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). The Supreme Court in *Aspen* went on to quote from Professors Areeda and Turner:

> Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

III P. Areeda & D. Turner, *Antitrust Law* 78 (1978). An important part of the inquiry, as directed by the *Eastman Kodak* Court, is whether conduct which impairs a rivals' opportunities can be justified by "valid business reasons." *Eastman Kodak*, 504 U.S. at 483, (quoting *Aspen*, 472 U.S. at 605). In *Eastman*, the Court held that there were triable issues of monopolization where there were reasons to doubt the validity and sufficiency of the business justifications asserted for the conduct.

Here, UST does not, at the summary judgment stage of the proceedings, attempt to show conclusively that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. This falls short of the proof which would be required to prevail on the

§ 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anticompetitive intent rather than a business justification for the exclusionary POS practices. Other circuits have focused on the issue whether the defendant's conduct served a legitimate purpose and whether it impaired the opportunity of rivals more than necessary to serve such a legitimate purpose. See, e.g., *Data General Corp. v. Grumman Syst. Support Corp.*, 36 F. 3d 1147 (1st Cir. 1994); *Instructional Syst. De el. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987).

At a minimum, these issues require the development of proof at trial, not summary disposition. While UST is correct that there is no rule which makes summary judgment improper in all circumstances in antitrust cases, their factual nuances and complexity may require a full rather than a truncated inquiry, for monopolization as well as other claims.

Recent Sixth Circuit case law demonstrates the need of the district court to apply careful restraint in using summary judgment to reject antitrust claims. In *Re/Max Int'l. Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), the court overturned a grant of summary judgment to the defendants which had been entered by the trial court.. The challenged trade practice in the *Re/Max* decision was significantly different from this case; the plaintiff realty firm disputed the "adverse split" policy of the defendants with respect to the division of real estate commissions between buyers' agents and sellers' agents. The lengthy opinion discusses a number of § 1 problems, but also addresses the issue whether summary judgment was appropriately entered on behalf of the defendants on plaintiff's § 2 monopolization claim. In a detailed discussion of the factors which may be used to prove the relevant geographic market and what a plaintiff must show alternatively to prove exclusion of competition in a monopolization case, the Sixth Circuit held that there was a

question of fact whether there had been "actual, sustained adverse effects on competition." *Id.* at 1019. Similarly, the present case presents complex questions of fact, which can be resolved only through trial, as to whether the sustained effects on competition which are preliminarily suggested by plaintiff's proof in the discovery record can be proven sufficiently before a jury.

One recent decision is worth particular mention. In *R.J. Reynolds Tobacco v. Philip Morris Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999), the trial court granted a motion for preliminary injunction in a case involving a challenge to a Philip Morris promotional program which gave preferred position to Philip Morris products in retail outlets. In ruling that this program likely constituted exclusionary conduct, the trial court lent significance to the advertising restrictions in the tobacco industry, which apply to moist snuff as well as to cigarettes:

> [V]isibility and advertising at the point of purchase are uniquely critical to competition in the cigarette industry as competitors lack significant alternative advertising channels to compensate for the lack of visibility at the point of purchase.

Id. at 511. Thus, other trial courts have found that point-of-sale restrictions may have an unusually strong exclusionary effect in the tobacco industry because of restrictions on broadcast media advertising.

UST also argues that summary judgment is appropriate in its favor because Conwood's case is flawed in its attempt to prove that antitrust injury flowed from the supposed violations of the Sherman Act; alternatively, it argues that the damages asserted are speculative and are not caused by the actions of UST.

This theory, like the summary judgment argument on the question whether the Sherman Act was violated, must fail

because of the fact-intensive nature of the dispute at bar. Multiple issues concerning injury, damage, and causation remain for trial. Included in these topics are the issue whether the damage claimed by Conwood is caused by UST, or instead is the result of independent, uncoerced decisions by retailers; whether the damage theory of Professor Leftwich, plaintiff's expert, can withstand challenge under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or other antitrust damage law principles; whether the effects on competition and on Conwood which plaintiff claims are the result of actions by UST at all, or other market forces; and other matters.

None of these topics is susceptible to resolution on the current record, without the testing of facts which a jury trial presents. The law in the Sixth Circuit does not require the district court to "short circuit" such a potentially complex inquiry without a trial. Plaintiff need only show an injury of the type which the antitrust laws were drafted to prevent and which flows from defendant's unlawful practices. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Arthur S. Lengenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.1984); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). The court does not wish to underemphasize the burden which plaintiff must meet at trial, but only to indicate that the detailed record on discovery prevents the summary disposition of issues.

The court re-emphasizes that the questions of whether these practices took place, how extensive they were, how much they were orchestrated by top management and how much by sporadic local efforts by "rogue" sales personnel, how effective they were in restraining or eliminating competition, whether they were eagerly sought by retailers or imposed by fast-talking, experienced UST representatives on sleepy seventeen year old nighttime sales clerks—all these

are issues which can be resolved only by a jury. The court does not presume to determine how they will be resolved—only that they present serious issues of material fact.

CONWOOD MOTION FOR PARTIAL SUMMARY JUDGMENT

Conwood itself has moved for partial summary judgment with respect to the issues of whether the relevant market is moist snuff in the United States, and whether UST possesses monopoly power in that market. In addition, Conwood seeks summary disposition of UST's counterclaims under the Lanham Act and state law.

Just as there are many "hotly disputed" questions of fact on the § 2 liability claims of Conwood, so too are there many "hotly disputed" questions of fact on market definition which prevent a summary ruling. (See UST memorandum in opposition to plaintiff's motion for summary judgment at p. 3.) While UST agrees that the relevant geographic market is the entire United States (see fn. 2 at p. 2 of its memorandum in opposition), UST seriously disputes the product definition offered by Conwood. UST asserts that there are questions of fact for the jury as to whether the relevant product market is broader than Conwood asserts, perhaps including all smokeless tobacco products, such as loose leaf chewing tobacco; alternatively, UST suggests that the product market could be segmented into separate product markets for natural and flavored moist snuff.

It is undisputed that Conwood, as plaintiff, has the burden of proving market definition. Given the extensive nature of discovery and conflicting factual accounts of the marketplace, the prevalence of serious expert opinion disagreements, and the obvious factor that the court is denying UST's summary judgment motion and setting the matter for trial, it would be unwarranted (and inconsistent) for this court to rule in a

summary fashion on the product market. *See Telecomm. Tech. Servs., Inc. v. Siemens Rolm Communications, Inc.*, 66 F. Supp.2d 1306 (N.D.Ga. 1998). Indeed, virtually everything about this litigation is, in UST's accurate characterization, "hotly disputed," and only a trial can resolve these issues.

Finally, in light of the denial of summary judgment both on the section two liability and product market motions, there is no basis for granting summary judgment to Conwood on UST's Lanham Act and state law claims. They may indeed prove out to be minor "tag along" theories, but the court will overrule Conwood's motion and permit them to proceed to trial with the vastly more extensive antitrust issues.

Ultimately, the present issue for the court is whether it should step into this complex, extensive litigation and call it to a halt without a trial. In order to do so, the court would have to conclude that there is no dispute of *material* fact. UST's argument concedes, for summary judgment purposes only, many of the facts which Conwood would have to prove at trial, thus nimbly taking many disputed issues out of the analysis. Instead, argues UST, taking the best version of the facts which the record might show for Conwood, there still is lacking any antitrust violation. However, this is simply too narrow a view of this dispute, and the court cannot say with certainty that no trial should take place in order to measure the extent, purpose, effect, and competitive impact of the broad exclusionary campaign which Conwood seeks to prove. Whether Conwood can carry this significant burden at trial is not for the court to say on summary judgment; however, the court concludes that on a cold summary judgment record it cannot resolve this matter fairly or within the meaning of Rule 56 and applicable case law on summary judgment practice. Likewise, the issues of product market definition cannot be determined summarily.

A trial is unavoidable; indeed, a trial is the very device which the law contemplates for the resolution of this kind of dispute.

CONCLUSION

Skillful counsel for both sides have vigorously presented the court with a broad range of briefing on critical issues in this case. While each case is unique on its facts, the factual bases asserted by Conwood here are sufficiently within the range of conduct which, if proven at trial, may form the basis for a jury determination of § 2 liability. Whether a jury, with the benefit of a full factual presentation, will assess UST's conduct as justified, vigorous competition in the marketplace, or an impermissible, unjustified series of exclusionary acts by a monopolist, is an issue which this court cannot decide on summary judgment. The case abounds with material factual issues, it presents an adequate legal foundation to withstand motion practice, and it will be judged at trial and not on briefs alone. The motions for summary judgment of both UST and Conwood are denied. (Docket #s207 & 208)

IT IS SO ORDERED.

This 17th day of February, 2000.

Thomas B. Russell, Judge.
United States District Court

Copies to: Counsel of Record

APPENDIX F

TITLE 15.—COMMERCE AND TRADE

CHAPTER 1.—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

15 U.S.C. § 2 (2002)

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

TITLE 15.—COMMERCE AND TRADE

CHAPTER 1.—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

15 U.S.C. § 15 (2002)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.